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No. 08-314

Supreme Court, U.S.
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In The

Supreme Court of the United States

DOUGLAS V. LANE,

Petitioner,

v.

STATE OF PENNSYLVANIA,

Respondent.

On Petition For Writ Of Certiorari To The Superior Court Of Pennsylvania

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Petitioner Douglas V. Lane was charged with committing acts of deviate sexual intercourse with two minor boys. Moreover, Petitioner was charged with possession of child pornography and manufacturing child pornography by taking photographs of each of the two adolescent victims which engaged in a "prohibited sexual act."[1] Furthermore, the Respondent developed evidence that Petitioner had engaged in a thirty-year pattern of grooming and sexually abusing young boys which began in the late 1960s.

At the close of the Respondent's case and in response to inquiries from the trial court, the Respondent concurred that several charges related to the sexual assault of one victim were time-barred.[2] As a result, a number of charges facing Petitioner were withdrawn. The Petitioner also made numerous motions demurring to the evidence and challenging the sufficiency of the evidence proving that Petitioner was the person who committed the crimes charged.

The trial court provided counsel for the parties a brief opportunity to present case law to the court regarding the additional motions and following the

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[1] 18 Pa. C.S.A. § 6312.

[2] A lengthy hearing was held prior to Petitioner's second trial relating to the Petitioner's claim that a second trial was barred on double jeopardy grounds. The trial court dismissed Petitioner's motion finding no intentional misconduct by the prosecution existed thus a second trial was permitted.

recess, all motions made by Petitioner were denied. *See, Commonwealth v. Kravitz*, 161 A.2d 861 (Pa. 1960) (Identification may be proven by direct or circumstantial evidence and may be inferred from the facts and circumstances which are of such a nature as to prove the defendant's guilt); *Commonwealth v. Hickman*, 309 A.2d 564 (Pa. 1973) (same).

Shortly thereafter in the first trial, the Petitioner requested that the Court grant a mistrial. The Respondent concurred with the request and the trial court ultimately granted Petitioner's request for a mistrial based upon the withdrawal of time-barred charges under Pennsylvania's recently changed statute of limitations for sexual offenses. Petitioner then filed a motion seeking to bar re-trial on double jeopardy grounds alleging prosecutorial misconduct related to the statute of limitations issue. The double jeopardy motion made no mention of the Petitioner's current claim that a re-trial should be barred due to the presentation of insufficient evidence at the first trial.

Following the second jury trial, the Petitioner was convicted of several offenses including Involuntary Deviate Sexual Intercourse resulting in the trial court imposing a sentence of fourteen years and three months to thirty years. On direct appeal to the Pennsylvania Superior Court, Petitioner for the first time raised the claim that his second trial was barred by the double jeopardy clause because allegedly insufficient evidence was presented at his aborted first trial.

In two paragraphs of a forty (40) page brief before the Pennsylvania Superior Court, Petitioner

raised the instant double jeopardy claim for the first time. After sharply criticizing Petitioner's lack of development and synthesis of the prosecutorial misconduct/double jeopardy claim, the Superior Court found that the issue was waived. In a footnote, the Superior Court also concluded the insufficient evidence/double jeopardy claim was waived since Petitioner failed to preserve it for appeal.

Following a denial of Petitioner's application for reargument before the Superior Court, the Petitioner unsuccessfully sought discretionary review by the Pennsylvania Supreme Court. This Petition for Writ of Certiorari followed.

REASONS FOR DENYING THE WRIT

I. The Decisions of the Pennsylvania Courts are Consistent with Well-Settled Precedent from this Court and do not Implicate an Irreconcilable Conflict Among the Federal and State Courts.

After having successfully requested a mistrial at his first trial, the Petitioner, consistent with decisions of this Court and those below, *Oregon v. Kennedy,* 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982), sought to bar retrial claiming intentional prosecutorial misconduct "goaded" him into requesting a mistrial. Thus, Petitioner claimed, a second trial should be barred by the Fifth and Fourteenth Amendments of the United States Constitution. After an evidentiary hearing on the matter, the trial court found

"[t]here is nothing to indicate the Commonwealth intended to provoke the defendant into requesting a mistrial nor was there any intention whatsoever to deny the defendant a fair trial." *Trial Court Opinion, March 23, 2005, p. 10.* Further, the trial court noted that the '[r]ecord makes it obvious that upon discovery of the Statute of Limitations defect and its impact on the trial that the Commonwealth did everything in its power to insure that the defendant received a fair trial and agreed with the Court and the defendant regarding a mistrial." *Id. at 11.*

Both the procedural posture of the Petitioner's successful request for a mistrial and the substantive claims made therein place limitations on the issues Petitioner may challenge on appeal from a denial of relief under the double jeopardy clause. *Kennedy, supra.* In *Kennedy*, this Court was confronted with the Oregon Court of Appeals decision barring retrial because of prosecutorial misconduct that occasioned the mistrial. *Kennedy,* 456 U.S. at 670, 102 S.Ct. at 2086, 72 L.Ed.2d at 419. Writing for the Court, then Chief Justice Rehnquist reversed the lower court "[b]ecause [the Oregon Court of Appeals] took an overly expansive view of the application of the Double Jeopardy Clause following a mistrial resulting from the defendant's own motion." *Id.*

The *Kennedy* Court noted that "[w]here the trial is terminated *over the objection* of the defendant, the classical test for lifting the double jeopardy bar to a second trial is the "manifest necessity" standard. . . ." *Kennedy,* 456 U.S. at 672, 102 S.Ct. at 2088, 72 L.Ed.2d 421 (emphasis supplied). The rationale

recognizes the clear distinction between cases wherein a defendant ***elects to terminate the proceedings against him*** by seeking a mistrial and those where the defendant does not request a mistrial yet his ability to have a jury finally decide his case interrupted by "manifest necessity."[3]

In situations where a defendant successfully moves for a mistrial, the substantive issues on which a defendant may challenge a second trial are quite narrow. In *Kennedy*, this Court held "[t]he circumstances under which such a defendant may invoke the bar of double jeopardy in a second effort to try him ***are limited to those cases in which the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial.***" *Kennedy*, 456 U.S. at 676, 102 S.Ct. at 2092, 72 L.Ed.2d 425 (emphasis supplied). As such, in *Kennedy*, the Court found that since the prosecutor did not intend to "goad" the defendant into requesting a mistrial, "[t]hat [was] the end of the matter for purposes of the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution." *Id.* That conclusion is equally applicable here.

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[3] The most common form of "manifest necessity" in granting a mistrial is where a jury is unable to reach a verdict. Therefore, that "manifest necessity" becomes the basis for the grant of a mistrial. *See, Arizona v. Washington*, 434 U.S. 497, 509, 98 S.Ct. 824, 832, 54 L.Ed.2d 717 (1978).

Simply put, the Petitioner's assertion that he is not barred from raising an ancillary double jeopardy claim unrelated to whether the basis for mistrial was intentionally created by the prosecution is without merit. At his first trial, the Petitioner proffered several motions demurring to the evidence presented. After argument and a review of applicable case precedent, each motion, including the claim of insufficient evidence regarding the identity of the Petitioner were denied by the trial court. Subsequent to those denials, the Petitioner sought to extinguish the proceedings and requested a mistrial. The Respondent concurred and the trial court granted the Petitioner's motion.

Pursuant to *Kennedy* and its progeny, following the successful request for a mistrial by a defendant, *the only inquiry* for purposes of Double Jeopardy barring a re-trial is whether the request for a mistrial was occasioned by prosecutorial misconduct designed to force a defendant into requesting a mistrial. In that procedural posture, it is plain to see the efficacy of such a rule. To allow a defendant in such circumstances, following the grant of a defense requested mistrial, to then challenge evidentiary rulings, issues of sufficiency of evidence and other claims when the very same defendant halted the ability to achieve finality on each of those decisions by requesting the termination of the trial defies logic and is contrary to well-settled precedent of this Court.

Despite the Petitioner's claims in Part I of his Petition for Writ of Certiorari, there is no conflict

among the federal circuits or the state courts regarding the principles governing a defendant's ability to appeal claims under the Double Jeopardy Clause following the successful grant of a defense-requested mistrial. The guidelines are narrow and clear in *Kennedy* and they militate strongly against his claim for relief before this Court.

II. The Question Presented Does Not Significantly Impact the Administration of Criminal Justice Because the Petitioner's Claim Is Governed by Well-Settled Law.

As referenced in Part I, the Respondent asserts that the claim for relief set Forth by the Petitioner is governed by this Court's holding in *Oregon v. Kennedy, supra. Kennedy's* holding clearly states that the ***only*** bar to retrial on Double Jeopardy grounds after a successful defense motion for a mistrial is "[w]here the conduct giving rise to the successful motion for mistrial was intended to provoke the defendant into moving for a mistrial." *U.S. v Larouche Campaign*, 866 F.2d 512, 514 (1st Cir. 1989).

In Part II of his Petition for Writ of Certiorari, the Petitioner relies almost exclusively on the holding of this Court in *U.S. v. Olano,* 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993), to support his request for the grant of the Writ. However, the Petitioner's reliance on *Olano* is misplaced. *Olano* concerned itself with the appealability of a claim that alternate jurors attended jury deliberations following the presentation

of evidence at trial. The sole issue was whether the defendant waived his right to appeal based upon the presence of the alternates when no objection was made at the trial level. This Court held that under Fed. R. Crim. P. 52(b), the attendance of the alternates was not an error the lower court was authorized to correct. *Olano, supra.*

Ultimately, this Court embarked upon a discussion distinguishing "waiver" and "forfeiture" as it relates to the failure to timely object at trial. *Id.* However, *Olano's* analysis and holding have no relevance here. Although Pennsylvania law dictates that Petitioner did, in fact, waive any challenge to sufficiency of the evidence at the first trial because he failed to raise it before the trial court, Pa. R. Crim. P. 575(A)(3), this Court's holding in *Kennedy* would specifically prohibit disposition of the issue even if it were timely raised.[4] Since the only Double Jeopardy issue permitted to be raised by a defendant who successfully moves for a mistrial prior to re-trial, intentional prosecutorial misconduct creating the

[4] It is well settled in Pennsylvania that the failure to timely raise a double jeopardy claim results in a waiver of that claim. *Commonwealth v. Gilman*, 485 Pa. 145, 401 A.2d 335 (1979); *Commonwealth v. White*, 264 Pa.Super. 495, 400 A.2d 194 (1979); *Commonwealth v. Rabik*, 259 Pa.Super. 456, 393 A.2d 916 (1978); *Commonwealth v. Carelli*, 291 Pa.Super. 502, 436 A.2d 228 (1981); *Commonwealth v. Fisher*, 244 Pa.Super. 361, 368 A.2d 762 (1976); *Commonwealth v. Splain*, 242 Pa.Super. 503, 364 A.2d 384 (1976); *Commonwealth v. Abruzzese*, 231 Pa.Super. 157, 331 A.2d 821 (1974); *Commonwealth v. Rispo*, 222 Pa.Super. 309, 294 A.2d 792 (1972).

need for a mistrial, was raised, litigated and decided by the trial court, the Petitioner's claim must fail.[5]

III. Since the Question Presented by the Petitioner Is Controlled by this Court's Decision in *Oregon v. Kennedy* the Grant of the Petition Is Neither Warranted Nor Imperative.

The question presented by the Petitioner is squarely controlled by this Court's decision in *Oregon v. Kennedy, supra*, and as a result, the grant of the Petition for Writ of Certiorari is not warranted. The Petitioner asserts that his petition should be granted so that this Court may promote clarity in this area of the law. *Respondent's Petition for Certiorari,* p. 15. However, Petitioner fails to acknowledge that this Court has already spoken with clarity on this issue in *Kennedy*.

The Petitioner invites this Court to allow a criminal defendant to use a successful request for a mistrial as both a sword and a shield. As a shield, the successful grant of a mistrial would ostensibly protect the defendant from an unfair verdict or one infected by incurable error. As a sword, the Petitioner suggests after obtaining his requested remedy, a mistrial,

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[5] The Trial Court's Opinion regarding the prosecutorial misconduct/Double Jeopardy claim filed by the Petitioner is attached in the Respondent's Appendix.

he may then litigate any number of perceived errors in the first trial – the one extinguished at his request – to bar retrial. Such tortured logic is patently unfair and runs counter to the holding in *Kennedy*. As a result, the Respondent submits that the grant of the present petition should be denied.

CONCLUSION

For the foregoing reasons, Respondent the Commonwealth of Pennsylvania prays that this Court deny his petition for writ of certiorari.

Respectfully submitted,

EUGENE M. TALERICO, JR.
Counsel of Record
Attorney for Respondent

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS OF LACKAWANNA COUNTY
vs.	:	CRIMINAL DIVISION
DOUG LANE	:	04 CR 1900-02

MEMORANDUM OF LAW

BARRASSE, J.

This matter is presently before the Court on the Defendant's Motion to Dismiss Criminal Informations Pursuant to Double Jeopardy Clauses of United States and Pennsylvania Constitutions. The parties and [sic] have filed briefs in support of their respective positions and a hearing was conducted on March 18, 2005 and the matter is ripe for disposition.

FACTUAL BACKGROUND

On two separate occasions the Defendant, Doug Lane ("Lane") was charged by the Pennsylvania State Police and the Lackawanna County District Attorney's Office with multiple counts of sexual offenses. On March 17, 2004, the Defendant was charged with two counts of Involuntary Deviate Sexual Intercourse, 18 Pa. C.S.A. § 3123(a)(5), one count of Corruption of Minors, 18 Pa. C.S.A. § 6301(a)(1), and one count of Indecent Assault, 18 Pa. C.S.A. § 3126(a)(1). The offenses committed upon Scott Saxton are alleged to have occurred between August 1990 and August 31, 1994.

On April 21, 2004, Lane was charged with two counts of Involuntary Deviate Sexual Intercourse. 18 Pa. C.S.A. § 3123(a)(5), seven counts of Sexual Abuse of Children, 18 Pa. C.S.A. § 6312(b), one count of Corruption of Minors, 18 Pa. C.S.A. § 6301(a)(1), two counts of Indecent Assault, 18 Pa. C.S.A. § 3126(a)(1) and (a)(8), five counts of Criminal Attempt to Possess Child Pornography, 18 Pa. C.S.A. § 901, six counts of Possession of Obscene & Other Sexual Materials, 18 Pa. C.S.A. § 5903(a)(3), and one count of Unlawful Use of a Communication Facility, 18 Pa. C.S.A. § 7512. The offenses committed against Jason Koelsch are alleged to have occurred between January 1996 and December 1999. A Preliminary Hearing was held on all charges before District Justice James Kennedy on July 22, 2004 and all charges were held for further court action.

On September 23, 2004, the Commonwealth filed the above referenced criminal informations against the defendant. On October 7, 2004, the defendant waived arraignment and a pretrial conference was conducted. An order listing the relevant dates, including the dates to file notions was issued at that time. The defendant subsequently requested, and was granted, several extensions of time for the filing of motions. On December 10, 2004, the Commonwealth presented Motions in Limine to admit testimony of prior bad acts of the defendant to show common plan or scheme. On February 1, 2005, past the deadlines granted in several extensions, the defendant filed an omnibus pretrial motion for relief.

Prior to the commencement of trial, argument was heard on the parties' motions. The Court denied the defendant's motions and granted the Commonwealth's motion to include evidence of prior bad acts for the limited purpose of showing common plan or scheme.

On February 28, 2005 trial commenced on the above referenced charges. On March 3, 2005, after the close of evidence, the defendant presented a general demurrer to the charges and specifically demurred to charges related to Scott Saxton as being time barred by the applicable statute of limitations. After reviewing the evidence and the applicable statute of limitations, the Court dismissed the following charges as being time barred:

- All criminal charges docketed to 04 CR 1900;
- Counts XII through XV of Criminal Information 04 CR 1901;
- Counts IV through VI of Criminal Information 04 CR 1902.

On March 4, 2005, the defendant motioned for a mistrial alleging that the defendant had been prejudiced by the presentation of evidence of crimes that were time-barred, in particular collateral evidence of sexual relations by the defendant with Scott Saxton in the form of audio tapes of a consensual telephonic intercept of conversations between the defendant and Saxton. The Commonwealth concurred in this motion and the Court declared a mistrial.

The defendant then filed this Motion to Dismiss and Bar Retrial Pursuant to Double Jeopardy. The defendant asserts that the actions of the Commonwealth constituted such an egregious and consistent pattern of prosecutorial misconduct that the retrial of the defendant is barred by the Double Jeopardy Clauses of the United States and Pennsylvania Constitutions.

STATEMENT OF LAW

It is well settled that prosecutorial misconduct may implicate Double Jeopardy under certain circumstances. ***Commonwealth v. Simone,*** 712 A.2d 770, 773 (Pa. Super 1998) *citing with approval,* ***Oregon v. Kennedy,*** 102 S.Ct. 2083, 2091 (1981). "Under both the federal and state constitutions, double jeopardy bars retrial where the prosecutor's misconduct was intended to provoke the defendant into moving for a mistrial." ***Commonwealth v. Chmiel,*** 777 A.2d 459, 464 (Pa. Super. 2001) *citing* ***Oregon v. Kennedy*** *supra* and ***Commonwealth v. Simmons,*** 522 A.2d 537 (Pa. 1987). Our Supreme Court held that the Double Jeopardy clause of the Pennsylvania Constitution prohibits retrial of a defendant not only when prosecutorial misconduct is intended to provoke the defendant to move for a mistrial, but also when the conduct of the prosecutor is intentionally undertaken to prejudice the defendant to the point of a denial of a fair trial. ***Commonwealth v. Smith,*** 615 A.2d 321 (1992); *See also* ***Commonwealth v. Martorano,*** 741 A.2d 1221, 1223

(Pa. 1999). "The double jeopardy clause of the Pennsylvania Constitution prohibits retrial of a defendant subjected to the kind of prosecutorial misconduct intended to subvert a defendant's constitutional rights." ***Chmiel*** at 464. This does not mean that prosecutorial overreaching is a per se bar to retrial. *See* ***Id.***; ***Commonwealth v. Simone,*** 712 A.2d 770 (Pa. Super. 1998).

Even grossly negligent unintentional prosecutorial overreaching will not bar retrial. ***Commonwealth v. Lesko,*** 719 A.2d 217 (Pa.1998.). The Commonwealth must intentionally goad the defendant into moving for a mistrial or specifically undertake to prejudice the defendant to the point of denying him a fair trial for double jeopardy to bar retrial. ***Commonwealth v. Strong,*** 825 A.2d 658 (Pa. Super. 2003). Even intentional prosecutorial misconduct, unless undertaken with the specific intention of depriving the defendant of a fair trial, does not implicate the double jeopardy clause. ***Commonwealth v. Mulholland,*** 702 A.2d 1027, 1033 (Pa. 1997); ***Commonwealth v. Moose,*** 623 A.2d 831, 837 (Pa. Super. 1993) and ***Commonwealth v. Santiago,*** 654 A.2d 1062, 1085 (Pa. Super. 1994). When a defendant successfully moves for a mistrial and prevails before conviction, any prosecutorial misconduct is less likely to subvert a defendant's constitutional rights. ***Simone,*** *supra* at 774.

The Pennsylvania Superior Court has set forth the relevant factors to consider in gauging allegations of prosecutorial misconduct.

> (1) the absence of any actions undertaken by the prosecutor to preserve the trial and to enhance the defendant's prospects for a fair trial after the misconduct occurred, (2) the absence of either abundant or convincing evidence of the defendant's guilt, so that the prosecutor's misconduct might reasonably be perceived as an attempt to rescue an inadequate prosecution, (3) the absence of misconduct causing serious and incurable prejudice to the defendant, (4) the absence of any neutral explanations, including inexperience, trial strategy, or inadvertence on the part of the government, to show that it did not, in fact, act purposely, (5) observations of the trial judge concerning the prosecutor's motives, and (6) defiance by the prosecutor of any direct order or clear admonition by the trial court to refrain from specific conduct prejudicing the defendant's prospects for acquittal.

Commonwealth v. Buffington, 444 A.2d 1194, 1197 (Pa. Super. 1982).

Pennsylvania Courts have on numerous occasions reviewed the application of an amendment extending applicable statutes of limitations and found that the extended time period applies when the amendment occurs before the prior limitation period expired. *See* ***Commonwealth v. Johnson,*** 520 Pa. 165, 553 A.2d 897 (1989); ***Commonwealth v. Morrow,*** 682 A.2d 347 (Pa. Super. 1996); ***Commonwealth v. Lavelle,*** 555 A.2d 218 (Pa. Super. 1989); ***Commonwealth v. Bell,*** 549 A.2d 205 (Pa. Super.

1988); ***Commonwealth v. Harvey,*** 542 A.2d 1027 (Pa. Super. 1988). Conversely, the extended limitation period cannot be applied when the statutory limitation period has already run when the amendment is passed. ***Id.***

The Pennsylvania Rules of Criminal Procedure provide that pretrial requests for relief should be included in one Omnibus Motion. Pa.R.Crim.P. 578. This motion shall be filed within 30 days after arraignment or waiver thereof. Pa.R.Crim.P. 579. The motion shall state with particularity the grounds for the motion, the facts that support each ground, and the types of relief or order requested. Pa.R.Crim.P 575

DISCUSSION

The defendant urges the Court to look at the totality of the Commonwealth's conduct in the investigations and prosecution of this case. The Commonwealth, on the other hand, suggests that the only applicable considerations in determining whether double jeopardy bars retrial is the actions that prompted the successful motion for mistrial. In order to scrupulously protect the defendant's Constitutional rights. the Court will follow the defendant's suggestion and review the entire course of the trial to determine whether there was intentional prosecutorial misconduct and, if so, such conduct bars retrial of the defendant.

The defendant, in his motions and argument, presents a litany of different actions of the Commonwealth that he asserts constitute misconduct, either intentional or grossly reckless. In summary, the actions alleged by the defendant are:

- Inadequate investigation and initiation of prosecution;
- Informations lacking in requisite factual and date specificity;
- Informations defective in duplicative charging;
- ***Brady*** violation in failing to disclose that some of the offenses were time barred;
- Evidence and references to time barred charges (relating to Scott Saxton) were presented and made to jury;
- Video display and references to "40 years of abuse" and "40 years of silence", references to inadmissible evidence and charges all of which were highly inflammatory and prejudicial and far beyond the limited admissibility purpose under Rule 404(B);
- Use of duplicative evidence of time barred offenses (audio tape of telephonic intercepts);
- Elicitation of testimony regarding events occurring after alleged offenses and beyond the time-frame in the information;

- Elicitation of prejudicial testimony beyond scope of proffer and limited admissibility purpose (in particular a witnesses' reference to suicidal thoughts);
- Improper contact with jurors following mistrial and prejudicial impact on potential jury pool for retrial.

The Court has reviewed the actions of the Commonwealth in regards to each of these instances of conduct referenced by the defendant and finds that none of them individually or taken as a whole constitute intentional misconduct by the prosecution. In fact, this Court finds that none of the conduct relied on by the defendant was improper or in error with the exception of the Commonwealth's failure to recognize that some of the charges were time barred by the Statute of Limitations, which is the only issue that even merits discussion. The defendant made several prior motions for mistrial during the trial. These motions were carefully considered by the Court, found to be without merit, and denied. The defendant's claims in that regard are clearly without merit and frivolous.

In regards to the Commonwealth's failure to recognize or notify the defendant of the lapse of the applicable limitations period, the defendant has produced no evidence, direct or even inferential, to indicate this was intentional or intended to prejudice the defendant. If the applicable Statutes of Limitations periods relative to the charges in this case were not a complex issue, then perhaps the defendant

would be able to raise an inference of bad faith. Here. the limitation periods involved a variety of charges with different limitation periods. The crimes alleged involved minor victims prompting the application of tolling of the limitation periods. The complexity of the Statute of Limitations issue is further exacerbated by the subsequent enactment of an extended limitations period applicable to many of the crimes alleged.

42 Pa. C.S.A. §5552 sets forth the applicable Limitations of Time within which prosecution of a criminal offense must commence (Statute of Limitations). The general scheme of the statute sets the limitation period for all crimes unless otherwise provided at two years from when the offense is committed. 42 Pa. C.S.A. §5552(a). The limitation period for enumerated Major offenses is five years. 42 Pa. C.S.A. §5552(b). A separate subsection b.1, enacted June 28, 2002 and effective 60 days later, sets the limitation period for enumerated Major sexual offenses (which includes the charges at issue here) at 12 years from the date the offense is committed. 42 Pa. C.S.A. §5552 (b.1). The statute also provides an exception which states, in pertinent part, that "Any sexual offense committed against a minor who is less than 18 years of age any time up to the period of limitation provided by law after the minor has reached 18 years of age." 42 Pa. C.S.A. §5552(c)(3). It further enumerates the particular crimes to which this exception applies, including those at issue here.

Pennsylvania Courts have repeatedly held that amendments lengthening the limitation period for

which prosecution can be commenced can be applied to crimes occurring before the enactment of the statute. This retroactivity is limited to when the limitation period applying to the crime has not lapsed prior to the enactment of the extended statute of limitation.

At the time that the offenses with which the defendant is charged occurred the previous version of 42 Pa. C.S.A. §5552 was in effect. This version of §5552 was similar to the current law, but differed in that the maximum limitation period for offenses was 5 years for major offenses (prior version §5552(b). The prior version also provided that, for certain offenses against minors, the limitation period did not begin to run until the victim reached the age of 18. Identifying the applicable limitations periods in this case involves a detailed analysis of each offense, the age of the victim at the time, the date that the victim would reach eighteen years of age, the application of the previous limitation period to the victim's eighteenth birthday and the date that the legislation providing the extended limitation period became effective.

At the March 18, 2005 hearing on this motion, First Assistant District Attorney Eugene Talerico, Jr., testified that the Commonwealth believed that the subsequent extension of the limitations period, to a twelve year period running from the minor victims' eighteenth birthday, applied retroactively to all of the charges in these cases. The defendant failed to challenge or contradict this testimony in any way. Attorney Talerico further testified that the Commonwealth

in no way intended to deprive the defendant of a fair trial. He testified that he first became aware of the possibility of an error in the Commonwealth's assessment of the limitations period following the end of the third day of trial, when the parties were contacted by the Court and asked to review the statute of limitations applicable to charges pertaining to Scott Saxton. He testified that he spent several hours researching the issue that evening and came to the conclusion that many of the charge were, in fact, commenced beyond the applications period. He further testified that the next morning he immediately notified the Court and defense counsel and concurred in the subsequent motion to dismiss the time barred charges.

The defendant has clearly produced nothing to indicate that any of the Commonwealth's actions in relation to the Statute of Limitations was intentional, much less the type of intentional misconduct undertaken for the purpose of prejudicing the defendant to the point of depriving him of a fair trial. In the absence of any evidence or facts to create an inference of intentionality, the worst possible characterization of the Commonwealth's error regarding the Statute of Limitation would be "grossly negligent unintentional misconduct", which would still not suffice to bar retrial. *See* ***Lesko,*** *supra*. Furthermore, while the Commonwealth bears the burden of persuasion as to whether a crime was committed within the statute of limitations period, it is the obligation of the defendant to assert this defense in the pretrial omnibus

motion. ***Commonwealth v. Groff,*** 548 A.2d 1237, 1244, 1248 (Pa. Super. 1988). See also ***Commonwealth v. Darush,*** 459 A.2d 727 (Pa. 1983); ***Commonwealth v. Riley,*** 479 A.2d 509 (Pa. Super. 1984). Failure to raise this issue in a timely pre-trial omnibus was a waiver of such claim. ***Id.*** The Pennsylvania Rules of Criminal Procedure provide that pretrial requests for relief should be included in one Omnibus Motion, Pa.R.Crim.P. 578. This motion shall be filed within 30 days after arraignment or waiver thereof. Pa.R.Crim.P. 579. In this case, the defendant was given multiple extensions of time to file his omnibus motion. Despite these extensions, the defendant failed to file this motion within the additional time period allotted to him.

The defendant finally filed his motions on February 1, 2005, over 100 days after his waiver of arraignment on October 7, 2004 and after the deadline for motions granted in the repeated extensions of time. The defendant's motion consisted of eleven specific motions in twenty-three pages of text. One, boilerplate, allegation 61(C) stated: "The charges set forth in the criminal informations are barred by the applicable statute of limitations." In this case, there were twenty-eight distinct counts contained in three separate informations. Many of these charges alleged offenses for which prosecution was commenced well within the limitation period. This allegation clearly fails to state with particularity the grounds for the motion and the facts that support such grounds for relief. See Pa.R.Crim.P 575.

The Court has reviewed the totality of the Commonwealth's conduct, paying particular attention to the relevant factors suggested by the Pennsylvania Superior Court in ***Buffington*** and finds that none of the factors that would indicate prosecutorial misconduct are present, in particular there is nothing to indicate the Commonwealth intended to provoke the defendant into requesting a mistrial nor that there was any intention whatsoever to deny the defendant a fair trial. The mistrial in this case was granted following the Commonwealth's concurrence that they could not establish that certain offenses were committed within the applicable limitations and their subsequent concurrence in the request for mistrial based on their belief that continuing to verdict would be unfair to the defendant following the admission of certain evidence. Contrary to the defendant's assertions that the Commonwealth intended to either provoke a mistrial or prejudice the defendant to the point of denying him a fair trial, the record makes it obvious that upon discovery of the Statute of Limitations defect and its impact on the trial that the Commonwealth did everything in its power to insure that the defendant received a fair trial and agreed with the Court and the defendant regarding a mistrial.

The Court's careful review of the totality of the Commonwealth's actions shows nothing to even remotely indicate intentional misconduct by the Commonwealth and only reveals one instance of what is clearly error. the misinterpretation of the applicable Statutes of Limitations. The defendant failed to

produce any evidence whatsoever or point to any actions that show or even create an inference of intentional wrongdoing by the Commonwealth. The Court finds that the defendant's motion to bar retrial pursuant to the Double Jeopardy Clauses of the United States and Pennsylvania Constitutions is palpably without merit and frivolous. The defendant's motion is therefore **DENIED**.

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS OF LACKAWANNA COUNTY
vs.	:	CRIMINAL DIVISION
DOUG LANE	:	04 CR 1900-02

ORDER

NOW, this 23rd day of March 2005, **IT IS HEREBY ORDERED AND DECREED** that the above-captioned defendant's Motion to Dismiss Criminal Informations Pursuant to the Double Jeopardy Clauses of The United States and Pennsylvania Constitutions is **DENIED**.

BY THE COURT:

/s/ Barrasse, J.
BARRASSE, J.